In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-507

WILLIAM L. HAMLING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their convictions must be reversed because they were tried under the obscenity standards applicable at the time of trial, which was before this Court decided *Miller* v. *California* and the related obscenity cases. They also raise numerous other claims of error, including whether scienter was established, whether the trial court excluded relevant evidence and whether the jury instructions were proper.

Following a jury trial in the United States District Court for the Southern District of California, petitioners were convicted on twelve counts of mailing and conspiring to mail an obscene brochure, in violation of

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18 U.S.C. 2, 371 and 1461.[1] Petitioner Hamling was sentenced to imprisonment for four years and was fined $32,000; petitioner Kemp was sentenced to imprisonment for three years and one day; petitioners Wright and Thomas received suspended sentences of one and one-half years, and were placed on probation for five years; petitioners Reed Enterprises, Inc., and Library Service, Inc., were fined $43,000 and $12,000 respectively. The court of appeals affirmed (Pet. App. A). After reconsidering a petition for rehearing in light of *Miller* v. *California*, No. 70–73, decided June 21, 1973, and companion cases,[2] the court denied rehearing (Pet. App. B and C).

The evidence summarized by the court below showed that approximately 55,000 brochures[3] advertising the Illustrated Report were mailed to postal patrons by a direct mail advertising service. The service was employed by an unindicted co-conspirator which was paid by petitioner Hamling, acting for petitioner Reed Enterprises. The mailing and the brochure identified petitioner Library Service as the mailing party, and stated that the Illustrated Report could be ordered from Library Service (Pet. App. 5). Petitioners

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[1] Petitioners were also charged in several counts with mailing and conspiring to mail an allegedly obscene book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" (hereinafter, "Illustrated Report"), but the jury did not reach a verdict on these counts.

[2] *Paris Adult Theatre I* v. *Slaton*, No. 71–1051; *United States* v. *Orito*, No. 70–60; *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, No. 70–2; *Kaplan* v. *California*, No. 71–1422.

[3] For a detailed description of the brochure, which was received in evidence, see the opinion below (Pet. App. 16–19). A copy is being lodged with the Court.

Kemp and Wright signed documents on behalf of Library Service for the post office box to which orders were to be sent (Pet. App. 6). Petitioner Thomas rented the postage meter installed at Library Service for use in mailing the Illustrated Report to those ordering it (Pet. App. 6). The court below concluded that the record evidence established that "[t]he individual appellants were responsible staff, policy decision making and operating members of the corporate appellants as distinguished from mere 'figurehead' officers and directors of their respective corporations" (Pet. App. 6).[4]

While urging that this Court's decisions in *Miller* v. *California*, No. 70–73, decided June 21, 1973, and its companion cases are "prospective" only (Pet. 26, 29), petitioners nonetheless argue that these decisions rendered the standards of *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413, under which they were convicted, unconstitutional.[5] This contention is without substance. At no point did this Court in its obscenity decisions indicate that its clarification and modification of the *Roth* and *Memoirs* standards were required because those standards were unconstitutional. See *United States* v. *Thevis*, 484 F.2d 1149 (C.A. 5); *United States* v. *One Reel of*

[4] The court also found that: "The government's evidence showed Hamling as the director and producer, Kemp, a writer, and the others the property managers and researchers for the production" (Pet. App. 25).

[5] In effect, therefore, they contend that *Miller* precludes any obscenity prosecutions for transactions occurring before June 21, 1973.

Film, 481 F.2d 206 (C.A. 1). Rather, it is clear that the Court believed that *Memoirs* imposed greater burdens on the regulation of pornography than were constitutionally necessary. It was, moreover, concerned with the absence, since *Roth*, of a single majority view defining proper standards for testing obscenity. *Miller*, *supra*, slip op. at 7–8, 14–15, citing as an example, *Redrup* v. *New York*, 386 U.S. 767. By setting out definite standards in a majority opinion, the Court sought to strengthen the judicial power to regulate pornography by giving lower courts more positive guidance in judging obscene materials. This, of course, does not mean that the standards set out in *Roth* or *Memoirs* were unconstitutionally vague or indefinite, and this was not the holding in *Miller*.

Furthermore, the remand action taken by this Court in cases subsequent to Miller, supra, ~~sequent cases~~ such as *Groner* v. *United States*, No. 72-1731, vacated and remanded, October 23, 1973, clearly indicates that convictions under the *Memoirs* standards are not unconstitutional. If they were, the Court would have reversed or merely vacated those convictions. Instead, the Court vacated the decisions and remanded the cases to the respective courts of appeals with directions to reconsider the cases in light of *Miller* and its companion cases.*

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* In a letter to the clerk dated October 24, 1973, petitioners have called this Court's attention to *United States* v. *Henson*, No. 73-2063 (C.A. 9, October 5, 1973), which remanded an obscenity case to the district court for reconsideration in light of *Miller*. We believe this course of action was inconsistent with *Miller* and other circuit court cases which have considered the

Under this procedure, defendants convicted under the old standards have the benefit of an independent appellate constitutional judgment under the modified standards. See *Jacobellis* v. *Ohio*, 378 U.S. 184, 188. Here the court below considered petitioners' convictions in light of *Miller* (Pet. App. B), and determined that no rehearing of its previous affirmance was necessary because the evidence was abundantly sufficient to meet, and the district court's jury instructions in full compliance with, the essential elements of the *Roth-Memoirs'* standards. "*A fortiori* the more relaxed standards announced recently by the Supreme Court [in *Miller*] were met." *United States* v. *One Reel of Film, supra*, 481 F.2d at 209. This decision was correct; the brochure involved here is obscene under any standard (Pet. App. 28).

The trial court's charge, which conformed to the *Roth-Memoirs standard* [1] (Pet. App. 28), imposed a substantially more stringent burden on the prosecution in proving obscenity than the guidelines laid down in *Miller*,

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issue and, after *Miller*, upheld convictions obtained under the *Roth-Memoirs* standard. *E.g.*, *United States* v. *Millican*, No. 73-1734 (C.A. 5, October 18, 1873); *Cote* v. *United States*, No. 72-2417 (C.A. 5, October 11, 1973); *Brown* v. *United States*, No. 71-1759 (C.A. 4, September 18, 1973); *United States* v. *Thevis*, 484 F. 2d 1149 (C.A. 5); *United States* v. *Miller*, 482 F. 2d 1379 (C.A. 9); *United States* v. *Sians*, 481 F. 2d 1406 (C.A. 7). We are petitioning the Ninth Circuit Court of Appeals for rehearing in *Henson*.

[1] "* * * three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs, supra*, 383 U.S. at 418.

supra.[8] The requirement of a finding of an appeal to prurient interest is not significantly different in the charge under *Memoirs* from the statement in *Miller*. The requirement, as charged, that the materials be shown to be utterly without redeeming social value imposed a greater burden on the government than showing, under *Miller*, a lack of serious literary, artistic, political, or scientific value.

It is only with respect to the second element of obscenity as described in *Miller* that there is even arguably any difference from the *Memoirs* standard which might be advantageous to petitioners. Under *Miller*, material pictures must depict "in a patently offensive way, sexual conduct specifically defined by the applicable state[9] law". *Miller, supra*, slip op. at 10.[10]

[8] "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole appeals to the prurient interest, * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value [citations omitted]." *Miller, supra*, slip op. at 9–10.

[9] "[The *Miller*] standards are applicable to federal legislation." *United States* v. *12 200-Ft. Reels of Film, supra*, slip op. at 7.

[10] As examples of "sexual conduct" which might be "specifically defined" in an obscenity law the Court suggested (*Miller, supra*, slip op. at 11):

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or description of masturbation, excretory functions, and lewd exhibition of the genitals."

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This element, too, was adequately comprehended in the instructions to the jury. In finding that the material was "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters" (Pet. App. 28), the jury found at least that the brochure "depict[ed] or describe[d], in a patently offensive way, sexual conduct". There remains only the question whether that "sexual conduct" was "specifically defined by the applicable * * * law."

This Court has indicated that the terms in current federal obscenity statutes, such as 18 U.S.C. 1461 under which petitioners were convicted, are to be construed as applying only to "patently offensive representations or descriptions of that specific 'hardcore' sexual conduct given as examples in *Miller* v. *California* * * *". *United States* v. *12 200-Ft. Reels of Super 8 mm Film*, No. 70–2, decided June 21, 1973 (slip op. at 7, n. 7). The examples given in *Miller* (see note 10, *supra*, p. 6) include descriptions of "ultimate sexual acts, normal or perverted", masturbation, and "lewd exhibition of the genitals". The description of the brochure in the court of appeals' opinion (Pet. App. 18) makes it clear that there can be no dispute that the brochure depicts the specific sexual conduct regulated by 18 U.S.C. 1461, as construed by *12 200-Ft. Reels of Film, supra*.[11]

[11] See also the court's summary (Pet. App. 19):

"[The brochure] stands alone, with its portrayals of explicit sexual activities between persons, among groups of persons, and a person and beast, as, simply put, hard core pornography under any definition or test."

Petitioners also suggest that measuring the brochure against a national community standard was error in light of *Miller*. *Miller* makes it clear that juries in obscenity cases need not apply a national standard, but does not indicate that such a standard is unconstitutional. Since the primary purpose of the community standard test is to assure that material will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or a totally insensitive one (*Miller, supra,* slip op. at 19), it is clear that application of a national, rather than a state, standard is not improper. See *United States* v. *Miller,* 482 F. 2d 1379 (C.A. 9). In any event, the court of appeals made its own independent constitutional judgment as required by *Jacobellis* v. *Ohio, supra,* 378 U.S. at 188, and found the brochure obscene under both standards (Pet. App. 39–40).

Petitioners' other contentions were all correctly answered in the court of appeals' opinion, upon which we rely.[12] We note in addition that with respect to the testimony on the materials' prurient appeal to sexually deviant groups and the court's instructions thereon, this was a proper application of the prurient-appeal test. *Mishkin* v. *New York,* 383 U.S. 502, 508–509, n. 7. If material which appeals to the prurient interest of clearly defined sexually deviant groups can satisfy the prurient-appeal test (*Mishkin, supra*), it does not cease to be obscene when combined with material which

[12] Petitioners assert that the evidence was insufficient to prove scienter; that the trial court erroneously excluded from evidence allegedly comparable pornographic material; that the trial court committed reversible error by not allowing objections

appeals to the normal person's prurient interest. With respect to petitioners' contention that young persons were improperly excluded from the jury wheel, we refer the Court to our oppositions to petitions for writs of certiorari in *Crews* v. *United States,* No. 72–6021, certiorari denied, 411 U.S. 908, and *D'Orsay* v. *United States,* No. 73–5288, certiorari denied, December 3, 1973, copies of which we are serving on petitioners.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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to jury instructions outside the presence of the jury; that the trial court erred in allowing testimony on the appeal of the material to the prurient interest of a clearly defined sexually deviant group; that the trial court erred in instructing the jury on pandering; that the prosecutor erred in his presentation of the evidence to the grand jury; that young persons were erroneously excluded from the jury wheel and the trial court erred in denying a continuance so that more young persons could presumably be added to the wheel; and that the trial court erroneously refused to ask some of the questions posed by petitioners on *voir dire* examination of prospective jurors.